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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Jane Doe # 1; Jane Doe # 2; Norlan Flores,  
on behalf of themselves and all others  
similarly situated,

Plaintiffs,

v.

Jeh Johnson, Secretary, United States  
Department of Homeland Security, in his  
official capacity; R. Gil Kerlikowske,  
Commissioner, United States Customs &  
Border Protection, in his official capacity;  
Michael J. Fisher, Chief of the United States  
Border Patrol, in his official capacity;  
Jeffrey Self, Commander, Arizona Joint  
Field Command, in his official capacity;  
Manuel Padilla, Jr., Chief Patrol Agent-  
Tucson Sector, in his official capacity,

Defendants.

Case No. 4:15-cv-00250-TUC-DCB

**BRIEF IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

**CLASS ACTION**

**Oral Argument Requested**

**(Assigned to the  
Honorable David C. Bury)**

Action Filed: June 8, 2015

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1 In his recent address to Congress, Pope Francis appealed to Americans' shared  
 2 history. "We, the people of this continent, are not fearful of foreigners, because most of  
 3 us were once foreigners. I say this to you as the son of immigrants, knowing that so many  
 4 of you are also descended from immigrants."<sup>1</sup> Pope Francis called on the United States to  
 5 treat the "thousands of persons [that] are led to travel north in search of a better life for  
 6 themselves and for their loved ones" in a way that is "humane, just and fraternal."<sup>2</sup>  
 7 Publicly, at least, the government concurs. "Scripture tells us," President Obama said in  
 8 his much-touted speech on immigration, "that we shall not oppress a stranger, for we  
 9 know the heart of the stranger—we were strangers once, too."<sup>3</sup>

10 Yet oppress is not too strong a word for what the federal government does, day in  
 11 and day out, to immigrants detained at short-term civil detention facilities along the  
 12 southern border. In U.S. Border Patrol "stations" in Arizona, the government—which  
 13 years ago pledged to transform immigration detention into a "truly civil detention  
 14 system"<sup>4</sup>—routinely and systematically denies immigrants the minimal civilized measure  
 15 of life's necessities. It forces immigrants to sleep on cold, trash-strewn concrete floors; it  
 16 detains immigrants for days in crowded cells without soap, showers, or hot water; it  
 17 punishes immigrants who complain by lowering cell temperatures and threatening to  
 18 confiscate food. These actions are as shameful as they are unconstitutional.

19 Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs Jane Doe #1, Jane Doe  
 20 #2, and Norlan Flores and putative Class Members (together "Plaintiffs") hereby move for  
 21 a preliminary injunction (1) enjoining Defendants and their agents and employees from  
 22

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23 <sup>1</sup> Pope Francis, *Address to the Joint Session of the United States Congress*, Sept. 24, 2015,  
 24 available at [https://w2.vatican.va/content/francesco/en/speeches/2015/september/  
 documents/papa-francesco\\_20150924\\_usa-us-congress.html](https://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150924_usa-us-congress.html).

25 <sup>2</sup> *Id.*

26 <sup>3</sup> U.S. President Barack Obama, *Remarks by the President in Address to the Nation on  
 Immigration*, Nov. 20, 2014, available at [https://www.whitehouse.gov/the-press-  
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27 <sup>4</sup> See, e.g., Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y.  
 28 Times, August 5, 2009, available at [http://www.nytimes.com/2009/08/06/  
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1 subjecting Plaintiffs to conditions of confinement in Tucson Sector stations that violate  
 2 Plaintiffs' Due Process rights by depriving Plaintiffs of sleep, warmth, a safe and sanitary  
 3 environment, and medical screening and care; and (2) compelling Defendants, pursuant to  
 4 5 U.S.C. § 706(1), to enforce certain minimal standards related to Plaintiffs' detention.

## 5 **I. INTRODUCTION**

6 Tucson Sector stations are designed for the short-term civil detention and  
 7 processing of immigrant detainees, "not . . . for long-term care and detention." (ECF No.  
 8 39-1, Ex. 1 ¶ 11.) Because they were not intended to be long-term detention centers—  
 9 and, specifically, because they were "not intended for sleeping" (Ex. 81 at USA00091)—  
 10 detention that exceeds 12 hours inevitably creates harsh and punitive conditions that  
 11 violate the constitutional rights of the detained individuals.<sup>5</sup> Yet detention for days on end  
 12 is the norm. Between June 10, 2015, and September 28, 2015, over 1000 people were  
 13 detained for longer than 48 hours. (Declaration of Joseph Gaston ("Gaston Decl.") ¶ 20.)  
 14 Defendants' repeated statements that these stations are "short-term facilities" for the  
 15 purpose of "brief initial processing," portray what stations are supposed to be, not what  
 16 they are. (ECF No. 52 at 2, 8-9.)

17 This gap between purpose and practice creates the harm. Detained individuals are  
 18 deprived of sleep, warmth, sanitation, food and water because Tucson Sector stations are  
 19 neither meant nor equipped to keep detained individuals for more than a few hours, let  
 20 alone for days. Aside from a steel door, cement benches, and a metal "sink/toilet unit,"  
 21 Tucson Sector "hold rooms" are bare, concrete cells. (Declaration of Eldon Vail ("Vail  
 22 Decl.") ¶ 208.) There are no beds; there is no bedding. Bright overhead lights are kept on  
 23 day and night. There are no kitchens to prepare meals, no showers, no recreational  
 24 spaces. Designed to be temporary "waiting rooms," they are being used as makeshift  
 25 dormitories—only without the most fundamental component of a dormitory: beds.

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26  
 27 <sup>5</sup> Twelve hours is not arbitrary. Chief Padilla himself testified that "border patrol seeks to  
 28 process and transfer all aliens out of their custody within 12 hours from apprehension." (ECF No.  
 39-1, Ex. 1 ¶ 11.)

1 The harm is compounded because Border Patrol agents were never supposed to be,  
 2 nor were they trained to be, jailers. Their job, as they themselves note, is the  
 3 “apprehension, processing, and temporary custody of aliens.” (ECF No. 39-1, Ex. 1 ¶ 3.)  
 4 The reality, however, is that Tucson Sector stations have become jails and Tucson Sector  
 5 agents have become jailers. The result is a national embarrassment.

6 The fix is clear: Defendants should process and transfer detained individuals  
 7 promptly or hold them in facilities that are designed for detention. What Defendants may  
 8 not do is continue to detain Plaintiffs under conditions of confinement that are degrading,  
 9 punitive, and unconstitutional—conditions that the U.S. government routinely condemns  
 10 when they occur elsewhere in the world.<sup>6</sup>

11 Plaintiffs will continue to suffer irreparable injury if preliminary relief is not  
 12 granted. The evidence—which includes video stills, photos, station logs, detainee  
 13 declarations, and expert opinion—demonstrates that Plaintiffs are likely to succeed on the  
 14 merits of their claims. Defendants’ mistreatment of Plaintiffs is profoundly inequitable  
 15 and serves no conceivable public interest. The relief Plaintiffs respectfully seek from this  
 16 Court is appropriate and urgent.

## 17 **II. BACKGROUND**

### 18 **A. The Conditions of Confinement in Tucson Sector Stations are** 19 **Inhumane and Punitive.**

20 Detained individuals are apprehended following lengthy, grueling, and perilous  
 21 journeys across the Sonoran Desert. (Vail Decl. ¶ 122.) They are, overwhelmingly,  
 22 exhausted, hungry, and thirsty. (*Id.* ¶ 140.) Many are sick or injured and in need of  
 23 immediate medical care. (*Id.*) Some fled their native land out of fear for their safety or  
 24 the safety of their loved ones. (*Id.* ¶ 152.) Others have U.S. citizen children and spouses.  
 25 (*Id.* ¶ 152.) Those detained include parents with young children (Declaration of Kevin  
 26 Coles (“Coles Decl.”) ¶ 37; Vail Decl. ¶ 61) and pregnant women (Vail Decl. ¶ 61).

27 <sup>6</sup> See, e.g., Dep’t of State, *Report on Int’l Prison Conditions*, May 22, 2013, available at  
 28 <http://www.state.gov/j/drl/rls/209944.htm>.

1 They are “question[ed] in the field” (ECF No. 39-1, Ex. 1 ¶ 7) before being brought  
 2 to one of eight Tucson Sector stations: the Brian A. Terry Station (formerly Naco Station),  
 3 Casa Grande Station, Douglas Station, Nogales Station, Sonoita Station, Tucson Station,  
 4 Ajo Station, and Willcox Station.<sup>7</sup> If these stations functioned as designed, CBP agents  
 5 would “expeditiously process individuals before they are either [*sic*] transferred, removed,  
 6 or released.” (ECF No. 39-1, Ex. 1 ¶ 18.) Instead, these “tired, poor, huddled masses,”  
 7 *Angov v. Lynch*, 788 F.3d 893, 909 (9th Cir. 2015), are imprisoned for days in bare  
 8 concrete cells, often for many days (Gaston Decl. ¶ 20).

9 Detained individuals are not medically screened on arrival (Vail Decl. ¶ 138;  
 10 Declaration of Joe Goldenson M.D. (“Goldenson Decl.”) ¶¶ 18-23), their medication is  
 11 confiscated (Vail Decl. ¶ 139; Goldenson Decl. ¶¶ 47-52), and those who ask for medical  
 12 assistance are ignored or rebuffed (Vail Decl. ¶ 139; Goldenson Decl. ¶¶ 43-46). As a  
 13 matter of policy, they are stripped of all outer layers of clothing, they are not permitted to  
 14 wash or change, and they are locked into cells—all of them, including pregnant women  
 15 and children. (Vail Decl. ¶¶ 104-105, 116, 123; ECF No. 39-1, Ex. 1 ¶ 12; Powitz Decl.  
 16 ¶ 92.)

17 They are usually, but not always (Vail Decl. ¶ 106), given “Mylar blankets” (ECF  
 18 No. 39-1, Ex.1 ¶ 15). These paper-thin sheets of plastic are demonstrably inadequate to  
 19 keep them warm in cells that, at times, drop to 58.8° Fahrenheit. (Vail Decl. ¶ 107.)  
 20 Surveillance video footage shows detainees huddled together, wrapped head-to-toe in  
 21 these flimsy plastic sheets, even during the hot Arizona summers:

22  
 23  
 24  
 25  
 26  
 27 <sup>7</sup> See *Tucson Sector Arizona*, U.S. Customs & Border Protection, available at  
 28 <http://1.usa.gov/1vuFTNw>.



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(Ex. 173 (photograph dated September 22, 2015); Vail Decl. ¶ 106; Powitz Decl. ¶ 95.) Detainees look cold, because, as they have testified, they *are* cold. (Vail Decl. ¶¶ 107-108; Powitz Decl. ¶ 100.) This cold is exacerbated because cells are made of concrete and metal. Unless they stand for 24 hours or more, they must sit or lie on heat-draining concrete floors and benches. (Vail Decl. ¶¶ 47, 109.) When detainees request more heat, guards refuse or, sometimes, make the cells *colder*. (Vail Decl. ¶ 108; Powitz Decl. ¶ 100.)

Some spend days in cells so crowded that they must sit or lie on every inch of floor space: next to toilets, wastebaskets, overlapping with one another. (Coles Decl. ¶ 109; Vail Decl. ¶¶ 32, 33, 52.) Some are forced to try to sleep sitting upright. (Vail Decl. ¶¶ 34, 35, 52.) They are given no beds, cots, or mattresses. (Vail Decl. ¶¶ 54, 56; Powitz Decl. ¶ 46, 48.) Stations have mats, but not nearly enough for the number of detainees regularly kept overnight. (Vail Decl. ¶ 57, 60, 62; Powitz Decl. ¶ 47, 48.) Moreover, Defendants provide mats only to juveniles (Vail Decl. ¶ 58; *see also* Ex. 87 at USA00634), which explains surveillance video footage showing detainees lying on

1 concrete floors while mats go unused in adjacent cells. (Vail Decl. ¶ 59; Coles Decl.  
2 ¶ 59.) Hold room lights are always on (Vail Decl. ¶ 63; ECF No. 39-1, Ex. 1 ¶ 8; Powitz  
3 Decl. ¶ 49), and detainees can be seen shielding their faces under Mylar sheets (Vail Decl.  
4 ¶ 64).

5 Hold rooms often lack potable water because none is provided or because the  
6 drinking fountains (or “bubblers”) attached to the toilet/sink units do not work properly.  
7 (Vail Decl. ¶¶ 80, 83, 85.) Detainees are often (and inexplicably) not given cups, despite  
8 ample disposable cups on site. (Vail Decl. ¶¶ 77, 79; Powitz Decl. ¶ 75.) As a result,  
9 detainees are forced to share drinking cups (Vail Decl. ¶ 77; Powitz Decl. ¶ 75) or recycle  
10 used juiceboxes (Vail Decl. ¶ 80). Surveillance footage from Casa Grande Station shows  
11 at least a dozen different detainees drinking from the same one-gallon plastic water jug  
12 over the course of five days. (*Id.* ¶ 81.) Even though the cell in question was twice  
13 cleaned by maintenance, no attempt was made to clean the jug. (*Id.* ¶ 82.)

14 Defendants regularly fail to feed detainees: between June 10, 2015, and  
15 September 28, 2015, there were 1,400 instances in which someone was not fed for 24 or  
16 more hours. (Gaston Decl. ¶ 45.) When they are fed, detainees are given some  
17 combination of a microwavable burrito, crackers, and juice for every meal and every  
18 snack. (Vail Decl. ¶ 90; Powitz Decl. ¶ 74.) Aside from baby food and formula, Tucson  
19 Sector stations stock no other food. (Vail Decl. ¶ 91.) Despite providing irregular and  
20 nutritionally inadequate “meals,” Border Patrol agents threaten to confiscate detainees’  
21 food to keep detainees quiet. (*Id.* ¶ 100.)

22 Detainees are confined with perfect strangers, but are afforded no privacy. Toilets  
23 are inadequately shielded from view by “low screening walls” and agents constantly  
24 monitor detainees through surveillance cameras mounted in each cell (ECF No. 39-1,  
25 Ex. 1 ¶ 14; Vail Decl. ¶ 50; Powitz Decl. ¶ 63). Because hold rooms are often  
26 overcrowded, there are insufficient toilets, and these are often in disrepair. (Vail Decl.  
27 ¶ 51; Powitz Decl. ¶¶ 51-52.)

28 Detainees are only sometimes provided with soap, but never towels, toothbrushes,



or toothpaste, and only rarely hot water and showers. (Vail Decl. ¶¶ 116, 117, 119, 120, 122; Powitz Decl. ¶¶ 58-60.) As a result, detainees are unable to wash their hands at any time, even after using the toilet or before eating. (Vail Decl. ¶ 115; Powitz Decl. ¶¶ 64, 73.) Hold rooms are cleaned infrequently. (Powitz Decl. ¶¶ 23, 27, 28, 29.) Surveillance footage from Casa Grande station indicates that they are cleaned once every 48 hours, if that (Vail Decl. ¶ 52), forcing mothers to care for their children on cell floors surrounded by days of accumulated trash (Powitz Decl. ¶ 30):



(Ex. 148.)

**B. Defendants’ Policies and Procedures, Recently Amended, Formalize and Systematize the Harm.**

Until very recently, the conditions of confinement in CBP stations nationwide were governed by CBP’s 2008 Hold Rooms and Short Term Custody Policy (“2008 Policy”). (Ex. 87.) The 2008 Policy recognized that CBP stations were designed for short-term detention. “Whenever possible,” it reads, “a detainee should not be held for more than 12 hours.” (*Id.* at USA000325.) Two months ago, however, Defendants issued new policies and procedures. The newly minted *National Standards on Transport, Escort, Detention, and Search* (“TEDS standards”) have all but abandoned the pretense that CBP stations are

1 used for short-term detention. Now, Defendants have decided, “[d]etainees should  
 2 generally not be held for longer than 72 hours” in these same facilities. (Ex. 95 at  
 3 USA00631.)

4 While significantly lengthening the duration of permissible detention, the TEDS  
 5 standards permit even worse conditions for detainees. The 2008 Policy stated that  
 6 “[d]etainees requiring bedding will be given clean bedding.” (Ex. 87 at USA000330.)  
 7 Despite now endorsing overnight detention, the TEDS standards permit only juveniles to  
 8 have beds or bedding. (Ex. 95 at USA000634.) Adults are supposed get “clean blankets  
 9 . . . upon request,” but only “when available.” (*Id.*) The 2008 Policy guaranteed detainees  
 10 soap to wash their hands after using the toilet or before eating. (Ex. 87 at USA000330.)  
 11 But under the TEDS standards—and despite assurances from Chief Patrol Agent Padilla  
 12 that the Tucson Sector “takes the health and safety of aliens within [its] custody seriously  
 13 (ECF No. 39-1, Ex. 1 ¶ 15)—soap “*may* be made available” but only when “operationally  
 14 feasible.” (Ex. 95 at USA000634 (emphasis added).) The list goes on.

15 If there was ever any doubt that, as a matter of policy and practice, Defendants can  
 16 and will detain Plaintiffs under conditions that deny Plaintiffs “the minimal civilized  
 17 measure of life’s necessities,” *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), the TEDS  
 18 standard erases it. Defendants have given themselves permission to hold Plaintiffs for at  
 19 least three days and three nights in constantly illuminated cells that lack beds, blankets,  
 20 soap, adequate food, potable water, and hot running water; and Defendants have done so  
 21 despite scores of federal judicial opinions condemning these very conditions.

### 22 **III. LEGAL STANDARD**

23 A movant is entitled to a preliminary injunction if she shows that she is likely to  
 24 succeed on the merits; that she is likely to suffer irreparable harm in the absence of  
 25 preliminary relief; that the balance of equities tips in her favor; and that an injunction is in  
 26 the public interest. *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir.  
 27 2009) (citation omitted). A movant also may rely upon an “alternate formulation” of this  
 28 standard under which “serious questions going to the merits and a balance of hardships



that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) (citation omitted). Under this second “sliding scale” approach, “the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). “The same standard applies regardless of whether the movant seeks to maintain the status quo or to halt an ongoing deprivation of rights.” *Klein v. City of Laguna Beach*, 381 F. App’x 723, 725 (9th Cir. 2010) (citation omitted). In addition, because a preliminary injunction is granted on less formal procedures than a full trial on the merits, *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), a court may consider otherwise inadmissible evidence in making its ruling, *Flynt Distributing Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984).

#### IV. ARGUMENT

##### A. Plaintiffs are Likely to Succeed On Their Claim That Defendants Violate Their Fifth Amendment Due Process Rights.

###### 1. Governing Law

Defendants are constitutionally obligated to care for individuals whom, like Plaintiffs, Defendants detain against their will:

[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

*DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199-200 (1989) (citations omitted).

Because Plaintiffs are civil detainees held pursuant to civil immigration laws,

1 *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), their protections derive from the Fifth  
 2 Amendment, which shields any person in the custody of the United States from conditions  
 3 that amount to punishment without due process of law. *Wong Wing v. United States*,  
 4 163 U.S. 228, 237 (1896).

5 Civil detainees “are entitled to conditions of confinement that are not punitive.”  
 6 *Jones v. Blanas*, 393 F.3d 918, 933 (9th Cir. 2004). Several principles follow from this  
 7 assertion. First, if a particular condition of confinement violates the Eighth Amendment,  
 8 it necessarily violates the Fifth Amendment. *Id.* Conditions that do not violate the Eighth  
 9 Amendment, however, may nonetheless violate the Fifth. Second, civil detainees may not  
 10 be subjected to conditions “intended to punish” or “excessive in relation to [their non-  
 11 punitive] purpose” or “employed to achieve objectives that could be accomplished in so  
 12 many alternative and less harsh methods.” *Id.* at 932–34 (citations omitted). Third, if  
 13 civil detainees are confined under conditions inferior to pretrial detainees or the  
 14 involuntarily committed—and of course the criminally convicted—those conditions are  
 15 presumptively punitive and unconstitutional. *Id.* at 933. Fourth, “to prevail on a  
 16 Fourteenth [or Fifth] Amendment claim regarding conditions of confinement, the confined  
 17 individual need not prove ‘deliberate indifference’ on the part of government officials.”  
 18 *Id.* at 934.

## 19 **2. Failure to Provide Beds and Deprivation of Sleep**

20 Detention facilities (and prisons) must provide detainees held overnight with beds  
 21 and mattresses. The absence of *either* violates detainees’ due process rights.  
 22 *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1448 (9th Cir. 1989); *accord Anela v.*  
 23 *City of Wildwood*, 790 F.2d 1063, 1069 (3d Cir. 1986). Indeed, the use of floor  
 24 mattresses—*i.e.*, mattresses without bed frames—is unconstitutional “without regard to  
 25 the number of days a prisoner is so confined.” *Lareau v. Manson*, 651 F.2d 96, 105 (2d  
 26 Cir. 1981). Photographs demonstrate that floor sleeping is ubiquitous in Tucson Sector  
 27 hold rooms (Vail Decl. ¶¶ 32, 33, 47, 52, 59, 73), despite Defendants’ policy that “hold  
 28 rooms are not designed for sleeping” (Ex. 81 at USA000091.) While Plaintiffs’ claim

succeeds on this ground alone, other conditions compound the problem.

First, hold rooms are overcrowded, forcing Plaintiffs to sleep next to toilets, sitting upright, and packed together head to toe:



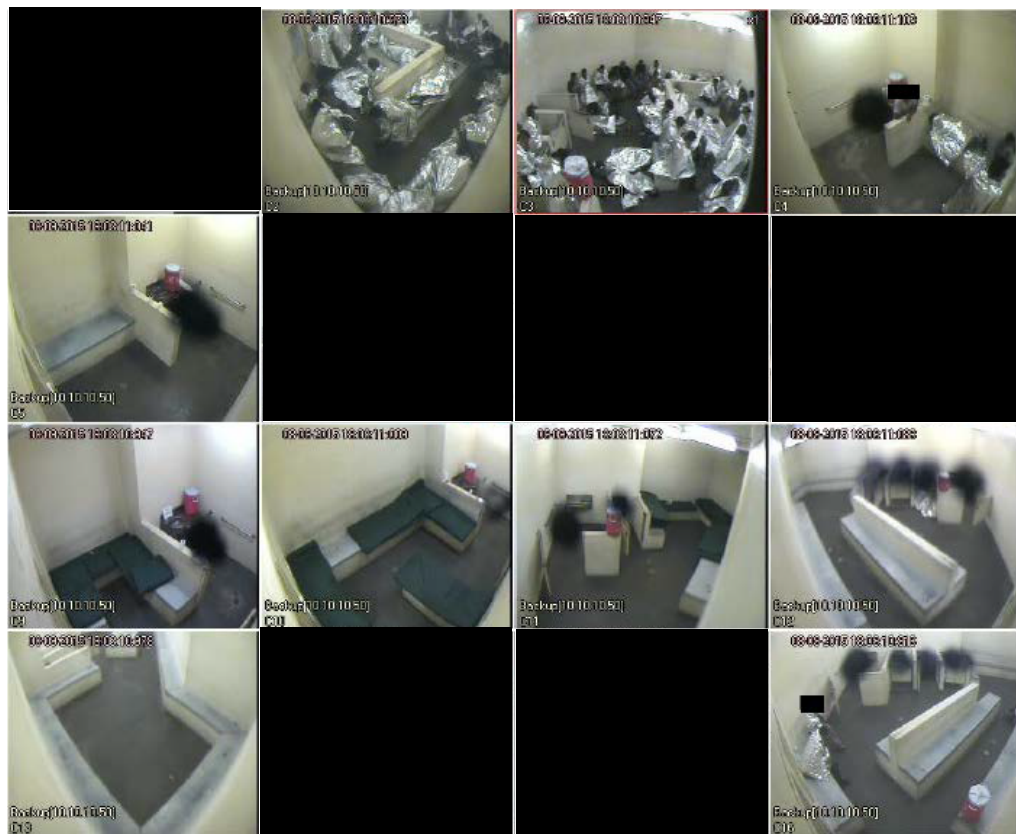
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(Ex. 188; Vail Decl. ¶¶ 32-33, 47, 52.) One detainee, who gave his spot on the floor to an injured man, was one of fifteen people forced to stand all night. (Vail Decl. ¶ 35.) Requiring detainees to sleep in shifts is not only inhumane and punitive, it has been roundly condemned by the U.S. government when it occurs in Ukraine, Haiti, and other countries.<sup>8</sup> A strikingly analogous situation was condemned as unconstitutional by the court in *Bowers v. City of Philadelphia*, No. 06-CV-3229, 2007 WL 219651 (E.D. Pa. Jan. 25, 2007). There, “[b]ecause of the overcrowded conditions . . . detainees were forced to sleep overlapping one another and on every inch of the concrete floors [and] huddled with their heads next to the toilets [and] on metal benches . . . if there was room.” *Id.* at \*10, \*24; *see also id.* at \*35 (issuing preliminary injunction). On this basis, too, Plaintiffs are likely to succeed on the merits of their due process claims.

<sup>8</sup>Report on Int’l Prison Conditions, U.S. Dep’t of State, May 22, 2013, available at <http://www.state.gov/j/drl/rls/209944.htm>.

1           Second, there is constant noise throughout the night. (Vail Decl. ¶¶ 65-66.) Courts  
2 have held that sleep-interrupting noise constitutes a due process violation. *Toussaint v.*  
3 *McCarthy*, 597 F. Supp. 1388, 1409–10 (N.D. Cal. 1984), *aff’d in part, rev’d in part on*  
4 *other grounds*, 801 F.2d 1080, 1110 (9th Cir. 1986); *accord Antonelli v. Sheahan*, 81 F.3d  
5 1422, 1433 (7th Cir. 1996) (“noise [that] occur[s] every night, often all night, interrupting  
6 or preventing . . . sleep” gives rise to due process claim). Third, hold cells are constantly  
7 illuminated. (ECF No. 39-1, Ex. 1 ¶ 8.) This, too, violates due process—particularly  
8 where, as here, the light interferes with sleep. *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th  
9 Cir. 1996), *amended on other grounds*, 135 F.3d 1318 (9th Cir. 1998) (“[T]here is no  
10 legitimate penological justification for requiring [inmates] to suffer physical and  
11 psychological harm by living in constant illumination. That practice is  
12 unconstitutional.”); *King v. Frank*, 328 F. Supp. 2d 940, 946–47 (W.D. Wis. 2004)  
13 (constant illumination leading to sleep deprivation may violate Eighth Amendment).

14           Together these and other conditions, including failure to provide adequate warmth,  
15 *infra*, deprive Plaintiffs of sleep, in violation of their Fifth Amendment due process rights.  
16 Such failures are not driven by necessity. In many instances, Defendants have unused  
17 hold rooms that could be used to alleviate overcrowding in adjacent rooms, but which  
18 Defendants choose not to use:



(Ex. 170.)

### 3. Failure to Provide Warmth

While temperatures in Tucson Sector hold rooms are supposed to range from 68 to 72 degrees Fahrenheit (*e.g.*, Ex. 115 at USA01896 (“Cell temps checked [68-72 degrees]?”)), Defendants’ own logs indicate that hold room temperatures drop as low as 58.8 degrees (Ex. 111 at USA01461), while others register 62 degrees with “[m]ultiple subjects complaining that it is cold” (Ex. 114 at USA01838-39).

58.8 degrees is cold even to the fully clothed, which detainees are not because Defendants routinely and systematically confiscate their outer layers of clothing upon intake. (Vail Decl. ¶ 104.) Despite their legal “obligation to ensure that [detainee] clothing is adequate,” Defendants do not replace confiscated clothing. *Toussaint*, 597 F. Supp. at 1411 (citation omitted). Instead, Defendants give—or at least are supposed to give—detainees a single Mylar sheet (ECF No. 39-1, Ex. 1 ¶ 15), though in practice some detainees get nothing (Vail Decl. ¶¶ 55, 106). Regardless, these Mylar sheets do little to



1 protect detainees against the cold (*Id.* ¶¶ 55, 106, 107; Powitz Decl. ¶ 101), especially  
 2 since these paper-thin sheets are all that stands between detainees and a concrete bench,  
 3 floor, or wall. *See United States v. Wilson*, 344 F. App'x 134, 137, 143 (6th Cir. 2009)  
 4 (cell furnished with only concrete bench and concrete floors stated Eighth Amendment  
 5 claim for subjection to cold).

6 This combination of concrete and metal furnishings and Defendants' failure to  
 7 provide proper blankets and "clothing that is at least minimally adequate for the  
 8 conditions under which [Plaintiffs] are confined," *Knop v. Johnson*, 667 F. Supp. 467,  
 9 475–77 (W.D. Mich. 1987), *aff'd in pertinent part*, 977 F.2d 996, 1012 (6th Cir. 1992),  
 10 unconstitutionally deprives Plaintiffs of warmth, *Henderson v. DeRobertis*, 940 F.2d  
 11 1055, 1059 (7th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992). Plaintiffs' are likely to  
 12 succeed on their claim for deprivation of warmth.

13 Moreover, Defendants' punitive use of hold room temperature—despite the clear  
 14 statement in the TEDS standard that "[u]nder no circumstances will officers/agents use  
 15 temperature controls in a punitive manner" (Ex. 95 at USA000633)—also violates  
 16 Plaintiffs' due process rights. Specifically, agents lower hold room temperatures to  
 17 punish detainees who speak to one another or who request that cell temperatures be raised.  
 18 (Vail Decl. ¶ 108; Powitz ¶ 100.) Because civil detainees may not be punished, any  
 19 punishment is *per se* a due process violation. *Jones*, 393 F.3d at 934. Plaintiffs are also  
 20 likely to succeed on the merits of their constitutional claim on this alone.

#### 21 **4. Failure to Provide a Safe and Sanitary Environment**

22 "A sanitary environment is a basic human need that a penal institution must  
 23 provide for all inmates." *Toussaint*, 597 F. Supp. at 1411. This obligation attaches all the  
 24 more for institutions of civil confinement like Border Patrol's Tucson Sector stations.

25 The right to a sanitary environment includes a "right to personal hygiene supplies  
 26 such as toothbrushes and soap," *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996), and  
 27 to "sanitary napkins for female prisoners," *Atkins v. County of Orange*, 372 F. Supp. 2d  
 28 377, 406 (S.D.N.Y. 2005); *see also Dawson v. Kendrick*, 527 F. Supp. 1252, 1288–89

(S.D. W.Va. 1981) (“The failure to regularly provide prisoners with clean bedding, towels, clothing and sanitary mattresses, as well as toilet articles including soap, razors, combs, toothpaste, toilet paper, access to a mirror and sanitary napkins for female prisoners constitutes a denial of personal hygiene and sanitary living conditions.”). Detainees, however, are routinely and systematically denied soap (Vail Decl. ¶¶ 117, 122)—a denial that is formalized in Defendants’ own policies and procedures (Ex. 95 at USA000634). They also are routinely and systematically denied sanitary napkins and diapers for babies and small children (Vail Decl. ¶ 125), both of which Defendants concede they are obligated to provide (Ex. 95 at USA000634), as well as toothbrushes and toothpaste. And they are routinely and systematically denied access to showers and hot running water—deprivations that have been deemed unconstitutional for “the most antisocial and violent of the inmates” in California’s prison system, *Toussaint*, 597 F. Supp. at 1394, 1411, but which Defendants regularly impose on ill, pregnant, and juvenile immigrants.

Lacking access to soap and warm water, detainees are unable to wash their hands before eating or after using the toilet. (Powitz Decl. ¶ 64; Vail Decl. ¶ 122.) This significantly increases the likelihood that infectious diseases common to prisons and other custodial institutions will be transmitted among detainees. (Powitz Decl. ¶¶ 54, 64, 70, 71, 89; Vail Decl. ¶ 122); *see also Bowers v. City of Philadelphia*, 2007 WL 219651, at \*15 (describing likely spread of disease under conditions of confinement akin to those in Tucson Sector hold rooms). Plaintiffs need not, of course, wait until they contract a communicable disease to seek relief: the Eighth (and therefore Fifth) Amendment “protects against future harm of inmates.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993); *accord Lareau v. Manson*, 651 F.2d at 109 (“it is unnecessary to require evidence that an infectious disease has actually spread in an overcrowded jail before issuing a remedy.”). Indeed, pretrial detainees have a constitutional right “to receive necessary and proper personal hygiene items as preventative of future medical and physical harm.” *Board v. Farnham*, 394 F.3d 469, 482 (7th Cir. 2005).

1 The right to a sanitary environment also includes access to functioning toilets,  
 2 which must be made available in reasonable proportion to the total number of detainees.  
 3 In *Fischer v. Winter*, a ratio of 15 detainees to one toilet was deemed constitutionally  
 4 insufficient. 564 F. Supp. 281, 297, 302 (N.D. Cal. 1983). But that is precisely the ratio  
 5 mandated by Defendants’ policy, Exhibit 81 at USA000090 (noting requirement of “1  
 6 toilet per 15 detainees”), and, in practice, the situation is far worse: In some hold rooms,  
 7 over 40 detainees were forced to share one toilet (Vail Decl. ¶ 51; Powitz Decl. ¶ 52).

8 Although “[n]o one in civilized society should be forced to live under conditions  
 9 that force exposure to another person’s bodily wastes,” *Gates v. Cook*, 376 F.3d 323, 334  
 10 (5th Cir. 2004), such exposure is not uncommon in Tucson Sector hold rooms. (Vail  
 11 Decl. ¶¶ 32, 51, 52.) Cleaning is infrequent and irregular; hold rooms lack cleaning  
 12 supplies and often trash cans (Vail Decl. ¶ 52; Powitz Decl. ¶¶ 27-31, 90), which are  
 13 routinely removed from hold rooms for “safety reasons” (ECF No. 39-1, Ex. 1 ¶ 14).

14 The unsanitary conditions of confinement in Tucson Sector hold rooms are not  
 15 only inhumane, but also inimical to detainees’ physical health. (Powitz Decl. ¶ 31, 39, 40,  
 16 41, 50, 70, 71, 89.) Because such sanitary deprivations have been “found to be *cruel and*  
 17 *unusual* under contemporary standards of decency,” *Young v. Quinlan*, 960 F.2d 351, 364  
 18 (3rd Cir. 1992) (emphasis added), Plaintiffs are substantially likely to demonstrate that  
 19 these deprivations violate due process.

## 20 **5. Failure to Provide Adequate and Sufficient Food**

21 Prison officials are “obligat[ed] to provide inmates with nutritionally adequate  
 22 meals on a regular basis.” *Foster v. Runnels*, 554 F.3d 807, 816 (9th Cir. 2009).  
 23 Defendants’ own regulations formalize this and other requirements: adults must be given  
 24 food at mealtimes and snacks in between (Ex. 95 at USA000635); juveniles and pregnant  
 25 women must receive additional food and must receive it more often (*id.* at USA000639).  
 26 To ensure that Defendants adhere to these requirements, they are obligated to document  
 27 “[a]ll meal service . . . in the appropriate electronic system(s) of record.” (Ex. 95 at  
 28 USA000635.)



Defendants’ electronic system of record—the so-called “e3DM” data—demonstrates that Defendants fail not only to abide by their own regulations, but also by minimal constitutional standards. Defendants regularly fail to feed detainees, sometimes for over 24 hours at a time. (Gaston Decl. ¶¶ 44, 45, 49). When detainees are fed, they receive for *every* meal and *every* snack some combination of a microwavable burrito, juice, and crackers. (*Id.* ¶¶ 41, 46; Vail Decl. ¶¶ 90, 91, 92, 93, 101). This diet—sporadic as it is—is neither nutritionally adequate nor “well-balanced,” *Smith v. Sullivan*, 553 F.2d 373, 379–380 (5th Cir. 1977) (articulating requirement); and is comparable to, if not nutritionally worse than, diets that courts have found inadequate in prisons, *Campbell v. Cauthron*, 623 F.2d 503, 508 (8th Cir. 1980) (finding inadequate “two sweet rolls and coffee for breakfast, and frozen ‘TV’ dinners for the noon and evening meals”). No wonder, then, that Plaintiffs testify to being constantly hungry. (Vail Decl. ¶ 94.)

As with hold-room temperature, Defendants use food punitively. (*Id.* ¶ 100-101.) This violates Defendants’ own policies (Ex. 95 at USA00635 (“[f]ood and water should never be used as a reward, or withheld as punishment”)), and it violates the Constitution, *Jones*, 393 F.3d at 932–34. Plaintiffs are likely to succeed on the merits of their claim.

## 6. Failure to Provide Potable Water

Defendants own regulations require that “[f]unctioning drinking fountains or clean drinking water along with clean drinking cups must always be available to detainees.” (Ex. 95 at USA00635.) Access to adequate water is likewise protected by the Constitution. *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996).

Detainees in Tucson Sector stations are regularly and systematically denied adequate drinking water because hold room drinking fountains or “bubblers” do not function properly (when they function at all) and detainees are given no substitute. (Vail Decl. ¶¶ 76-85; Powitz Decl. ¶ 85.) Just as often, hold rooms have water, but detainees are not given clean cups (Vail Decl. ¶¶ 77, 79, 81; Powitz Decl. ¶ 75), forcing them to share drinking cups or other receptacles (Vail Decl. ¶¶ 77, 80-82). In other words, detainees either receive insufficient potable water or they are presented with a “Hobson’s

choice” between water contaminated with the bodily fluids of other detainees and no water at all. Forcing detainees to share drinking cups threatens detainee health; this risk is exacerbated by Defendants’ failure to medically screen incoming detainees ((Powitz Decl. ¶ 78, 80); *see infra* IV.A.7). *Helling v. McKinney*, 509 U.S. at 33–34 (Eighth Amendment protects against future harm posed by unsafe drinking water). The absence of potable water and clean drinking cups violates the Constitution. Plaintiffs are likely to succeed on this claim as well.

### 7. Failure to Provide Adequate Medical Screening and Care

Chief Padilla testified that “Tucson Sector takes the health and safety of aliens within their custody seriously.” (ECF No. 39-1, Ex. ¶ 15.) Not true.

First, Defendants fail to medically screen incoming detainees, despite clear case law in this and other Circuits that denying, delaying, or mismanaging intake screening violates the Constitution. *Gibson v. Cty. of Washoe, Nev.*, 290 F.3d 1175, 1188–90 (9th Cir. 2002); *Lareau v. Manson*, 51 F.2d at 109. This affirmative duty to screen applies both to short-term detention facilities housing civil detainees and to penitentiaries housing convicts. *Graves v. Arpaio*, 48 F. Supp. 3d 1318, 1340–1344 (D. Ariz. 2014) (jail); *Madrid v. Gomez*, 889 F. Supp. 1146, 1257 (N.D. Cal. 1995) (prison).

Yet in most cases “medical screening” in Tucson Sector stations is conducted—if and when it is conducted—by border patrol agents “in the field,” not by a nurse, doctor, or other qualified or specially trained personnel. (ECF No. 39-1, Ex. 1 ¶ 9; Vail Decl. ¶¶ 138, 139.) Defendants’ own policies confirm this: “If an *officer/agent* suspects . . . that a detainee may have a contagious disease, the detainee should be separated whenever operationally feasible.” (Ex. 95 at USA00634 (emphasis added).) This contradicts both commonly accepted standards in similar facilities throughout the nation (Goldenson Decl. ¶¶ 12-17; 24-30), as well as the constitutional minimum courts have required court orders in similar cases. *See, e.g., Graves*, 48 F. Supp. 3d at 1340. Beyond Defendants’ written policies, numerous detainees have declared that their attempts to obtain medical attention for injuries that occurred prior to apprehension were rebuffed by the agents executing

1 Defendants' medical screening "policy."

2 Second, Defendants fail to maintain a medical treatment program capable of  
3 "responding to emergencies" that arise after detainees are placed in the holding cells.  
4 *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982), *abrogated on other grounds by*  
5 *Sandin v. Conner*, 515 U.S. 472 (1995); *see also Shorter v. Baca*, -- F. Supp. 3d. --, No.  
6 12-cv-7337-DOC, 2015 WL 1809282, at \*16 (C.D. Cal. Apr. 21, 2015) (jail officials  
7 violated Eighth (and thus Fifth) Amendment by denying pretrial detainee emergency  
8 dental care); *cf. Estate of Prasad ex rel. Prasad v. County of Sutter*, 958 F. Supp. 2d 1101,  
9 1114 (E.D. Cal. 2013) (failure to maintain around-the-clock medical personnel in jail  
10 constitutes deliberate indifference). By law, Defendants must permit detainees "to make  
11 their medical problems known to the medical staff" in the detention facility and such staff  
12 must be "competent to deal with the [detainees'] problems." *Hoptowit*, 682 F.2d at 1253.  
13 Such around-the-clock access to medical staff is standard throughout similar facilities.  
14 (Goldenson Decl. ¶¶ 13, 16.)

15 Third, Defendants' practice of confiscating incoming detainees' medication,  
16 creates an impermissible and heightened risk that detainees will experience a medical  
17 emergency. *Hernandez v. County of Monterey*, -- F. Supp. 3d. --, No. 5:13-CV-2354-  
18 PSG, 2015 WL 3868036, at \*17 (N.D. Cal. Apr. 14, 2015). It is standard in similar  
19 detention facilities through the United States to have in place a policy maximizing a  
20 detainee's ability to continue prescribed medication. (Goldenson Decl. ¶ 47.) Numerous  
21 courts have held that such efforts are constitutionally required in the jail setting.  
22 *Hernandez*, 2015 WL 3868036, at \*12 ("It is critical for correctional facilities to maintain  
23 continuity of treatment for newly admitted inmates."); *Graves*, 48 F. Supp. 3d at 1341  
24 (reviewing procedures implemented under court order to ensure that arriving detainees are  
25 promptly continued on prescription medications); *cf. Wakefield v. Thompson*, 177 F.3d  
26 1160, 1164–65 (9th Cir. 1999) (prison officials violate Eighth Amendment by failing to  
27 supply, at time of release into the community, a prisoner with sufficient medication to  
28 permit him to consult with community-based doctor). Accordingly, Plaintiffs are likely to

succeed on their claim that Defendants’ denial of adequate medical screening and care violates their due process rights.

**B. Plaintiffs are Likely to Succeed on Their Claim That Defendants Have Failed to Enforce Mandatory Statements of Policy.**

**1. Governing Law**

A party can sue under the APA to compel an agency to abide by its own statement of policy when such a statement constitutes “agency action.” 5 U.S.C. § 706(1) (requiring court to “compel agency action unlawfully withheld or unreasonably delayed.”). “[A]gency action’ is defined in [5 U.S.C.] § 551(13) to include ‘the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act.*’” *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004). The APA defines the term “rule” as “an agency statement of . . . future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551(4). An agency statement that meets this definition constitutes agency action. *See, e.g., Defenders of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1114 (D. Ariz. 2009) (Bury, J.) (agency’s “Standard Operating Procedure” was a “rule” under APA).

Such a statement has the force and effect of law, and can be enforced under the APA, when it (1) prescribe[s] substantive rules—not interpretive rules, general statements of policy or rules of agency organization—and (2) conforms to certain procedural requirements. *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1071 (9th Cir. 2010) (citation omitted). “To satisfy the first requirement, the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.” *Id.*

The TEDS standard constitutes a “rule” and enforceable guidance under the *River Runners* standard. It is “an agency-wide policy that sets forth the first nationwide standard which govern CBP’s interaction with detained individuals. . . . In addition to transport, escort, detention and search provisions, TEDS also includes requirements

related to: sexual abuse and assault prevention and response; care of at-risk individuals in custody; and personal property.” (Ex. 95 at USA00620.) Each and every one of these “requirements” affects the individual rights of all detainees in Border Patrol stations, including—but certainly not limited to—their right to “bodily integrity.” *Albright v. Oliver*, 510 U.S. 266, 272 (1994). It also sets out agency and CBP agent obligations. (Ex. 95 at USA00621, USA00626, USA00633 (CBP agents must, *inter alia*, “perform their duties in a non-discriminatory manner,” “safeguard detainees during a search,” and “grant detainees telephone access.”).) Finally, it states specifically the statutory, regulatory and other authority under which it was promulgated. (*Id.* at USA000620.) It clearly satisfies the *River Runner* standard.

## 2. Defendants Fail to Abide by the TEDS Standards.

Having formalized their inhumane and punitive practices, Defendants fail even to meet the modest goals articulated in the TEDS standards, much less the preceding 2008 Policy. (Vail Decl. ¶ 72.) Defendants are obligated to provide “clean bedding . . . to juveniles” (Ex. 95 at USA00634), “clean drinking cups” (*id.* at USA00635), and “toilet paper and sanitary napkins” (*id.* at USA00634). But Defendants fail to do so. (Vail Decl. ¶¶ 51, 77, 79, 80, 81, 125; Powitz Decl. ¶¶ 60, 75.) Defendants are obligated to an “maintain hold room temperature within a reasonable and comfortable range.” (Ex. 95 at USA00633.) But Defendants fail to do so. (Vail Decl. ¶¶ 107, 108; Powitz Decl. ¶¶ 91, 95, 96, 101, 102, 105.) Defendants are obligated to “regularly and professionally clean[] and sanitize[]” hold cells. (Ex. 95 at USA00633.) But Defendants fail to do so. (Vail Decl. ¶ 52, Powitz Decl. ¶¶ 18, 23, 29, 30, 32, 42, 90.) Defendants are obligated to make drinking water “always . . . available” and provide meals regularly. (Ex. 95 at USA00635.) But Defendants fail to do so. (Vail Decl. ¶ 152.) Finally, although Defendants may *not* “use temperature controls in a punitive manner” (Ex. 95 at USA00633), and use “[f]ood and water . . . as punishment” (*id.* at USA00635), this is precisely what Defendants do (Vail Decl. ¶¶ 100, 108; Powitz Decl. ¶ 100).

Plaintiffs are likely to succeed on the merits of their claim that Defendants are

obligated but fail to enforce certain minimal standards related to Plaintiffs’ detention.

**C. Plaintiffs Will Suffer Irreparable Harm If This Court Does Not Grant An Injunction.**

“It is well established that the deprivation of constitutional rights ‘unquestionably constitutes irreparable injury.’” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted); *Majors v. Jeanes*, 48 F. Supp. 3d 1310, 1317 (D. Ariz. 2014) (same). Where, as here, a movant demonstrates a likelihood of success on a constitutional claim, “it follows . . . ‘that irreparable harm is *likely*, not just possible’ in the absence of preliminary injunctive relief.” *Rodriguez v. Robbins*, 715 F.3d 1127, 1144–45 (9th Cir. 2013) (citation omitted). Having shown a constitutional deprivation, Plaintiffs need establish nothing else: “[W]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable [harm] is necessary.” *Pure Wafer, Inc. v. City of Prescott*, 14 F. Supp. 3d 1279, 1302 (D. Ariz. 2014) (citation omitted).

Lest there be any doubt, however, the harm to Plaintiffs—which includes suffering, risk of exposure to disease, the denial of food, medicine, and other necessities—is manifestly irreparable. *Hernandez*, 2015 WL 3868036, at \*15 (holding that suffering, risk of tuberculosis, and no medical access constitutes irreparable harm); *Harris v. Bd. of Supervisors, L.A. Cty.*, 366 F.3d 754, 766 (9th Cir. 2004) (same for pain, infection, medical complications); *V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1121 (N.D. Cal. 2009) (same for denial of food, medication, and other necessities).

Defendants’ apparent reluctance to acknowledge, much less remedy, the conditions in Tucson Sector stations makes it not just likely but certain that the irreparable harm will continue. *Zepeda v. U.S. INS*, 753 F.2d 719, 727 (9th Cir. 1984). Defendants’ statements to this Court that Tucson Sector stations are “short-term facilities” ignores reality (ECF No. 52 at 2), and demonstrates that Defendants do not intend to change their ways absent an order from this Court. Indeed, all that Defendants have done is formalize their policies—a transparent, but unsuccessful attempt at *post hoc* “legalization.”



**D. The Balance of Equities Tips Sharply in Plaintiffs' Favor.**

This Court “‘must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.’” *Winter v. Nat. Res. Def. Counsel*, 555 U.S. 7, 24 (2008) (citation omitted). Here, the answer is clear: the harm to Plaintiffs’ outweighs any conceivable hardship to Defendants.

Detained individuals continue to be harmed by the deprivation of sleep, warmth, adequate food and water. The health risk posed by the lack of medical screening, soap, and clean hold rooms alone tips against any administrative government hardship. On Plaintiffs’ side is their physical well-being and human dignity; on Defendants’ is some speculative and relatively minimal financial or administrative burden. “[F]aced with [ ] a conflict between financial concerns and preventable human suffering, [the court has] little difficulty concluding that the balance of hardships tips decidedly in plaintiffs’ favor.” *Harris*, 366 F.3d at 766 (alterations in original) (citation omitted); *accord Rosado v. Alameida*, 349 F. Supp. 2d 1340, 1348 (S.D. Cal. 2004) (“When adjudicating a preliminary injunction motion, the Ninth Circuit expects lower courts to protect physical harm to an individual over monetary costs to government entities.”).

Defendants’ hardship, moreover, is really no hardship at all, because Defendants are *already required* to follow the Constitution. “[The government] cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns.” *Rodriguez*, 715 F.3d at 1145; *see also Zepeda*, 753 F.2d at 727 (“[T]he INS cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations.”). When the government’s so-called burden is weighed against the “the major hardship posed by needless prolonged detention” of immigrants, the balance tips toward an injunction. *Rodriguez*, 715 F.3d at 1145.

**E. A Preliminary Injunction Serves the Public Interest.**

“The public interest inquiry primarily focuses on the impact on non-parties, as opposed to parties.” *Friendly House v. Whiting*, 846 F. Supp. 2d 1053, 1062 (D. Ariz. 2012) (citation omitted). How our own government treats immigrants concerns us all,

1 including—if we are to believe what it has said publicly—the government itself.

2 The Supreme Court has articulated, and the Ninth Circuit has reaffirmed, “the  
3 highest public interest in the due observance of all the constitutional guarantees.” *U.S. v.*  
4 *Raines*, 362 U.S. 17, 27 (1960); *Melendres*, 695 F.3d at 1002 (“it is always in the public  
5 interest to prevent the violation of a party's constitutional rights”). Stopping Defendants’  
6 mistreatment of immigrants in government-operated detention facilities in Arizona serves  
7 the public interest. And so does “a preliminary injunction that ensures that federal statutes  
8 are construed and implemented in a manner that avoids serious constitutional questions.”  
9 *Rodriguez*, 715 F.3d at 1146. The preliminary injunction sought here would merely  
10 guarantee that Defendants cease to interpret and execute their authority to act under color  
11 of federal law in ways that violate the Fifth Amendment.

12 Defendants, moreover, can claim no public interest in denying immigrants the  
13 minimal civilized measure of life’s necessities—in denying them sleep, warmth, medical  
14 care, food and water. While the public has an interest in “assuring that public funds are  
15 appropriately expended,” there is nothing “inappropriate” about ensuring that detained  
16 individuals are not mistreated. *Rosado*, 349 F. Supp. 2d at 1348–49. To the contrary,  
17 where, as here, the fisc is balanced against preventable constitutional harm, the latter must  
18 prevail, *id.* at 1349. Likewise for government claims of “security,” *Jordan v. Gardner*,  
19 986 F.2d 1521, 1527 (9th Cir. 1993), and “logistical difficult[y],” *Rodriguez*, 715 F.3d at  
20 1146.

21 An injunction is in the public interest.

## 22 **V. CONCLUSION**

23 For the foregoing reasons, Plaintiffs respectfully ask this Court to enjoin  
24 Defendants, their agents and their employees from detaining Plaintiffs and putative class  
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1 members under conditions that are punitive, inhumane, and unconstitutional pending final  
2 resolution of this suit.

3  
4 Dated: December 4, 2015

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